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The international community must intervene on Kashmir

Kashmiris need self-determination, not military occupation.

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Association of Parents of Disappeared Persons welcomes OHCHR report on gross human rights violation done by the military apparatus of India in Kashmir, from May 2018 to April 2019. | SOPA Images/PA. All rights reserved.

The Modi administration's undemocratic revocation of the semi-autonomous status of the State of Jammu & Kashmir (J&K) on August 5 through what legal scholars are terming an illegal and unconstitutional process is being proclaimed the death of Indian democracy.

Beyond such proclamations, the revocation has taken place in conditions of an intensified military occupation. Since midnight on August 4, authorities have instituted a blockade on communications in the region including internet services, mobile connectivity, and landlines as well as an around-the-clock curfew. Approximately 40,000 extra troops have been flown in, in addition to the half a million already present. The lockdown has been unprecedented even for Kashmir. Over 800 civilians including Kashmir's political leadership, Chamber of Commerce members, Bar Association President, civil society actors, and human rights defenders have been arrested en masse.

Though shocking in its swift execution, this move was not unexpected. The Hindu nationalist Bharatiya Janata Party (BJP) has listed the revocation of Article 370 in its election manifesto, and the dream of 'integrating' Kashmir has been part of Hindu nationalism since 1947. Regardless of the political party in power, Kashmiris have endured 70 years of undemocratic hollowing out of the autonomy secured at the time of the region's provisional accession to India. This hollowing out has been enacted through constitutional means, political corruption, and intensive state militarization, including a long history of detention of elected leaders and the rigging of elections.

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The annexation of Kashmir is the latest move by the Modi administration, performed by abolishing the special status of J&K and bifurcating the region into two Union Territories. This move sets the scene for India's inauguration of an Israeli-style settler colonialism. For the first time in the modern era, non-Kashmiris may be able to buy land and become permanent residents in Kashmir. This prospect will change the demography of the state, potentially destroying the political identity of Kashmiris through a process of ethnic cleansing.

The limits of the Indian constitution

Kashmiris have long experienced the cruel irony of India's claims to democratic governance. As a necessary evil, Article 370 provided the legal arrangement for India's provisional and autonomous administration of J&K until a political settlement could be negotiated in alignment with Kashmiri aspirations. UN resolutions between 1948-1956 stated the need for a free and fair plebiscite for Kashmiris. As these aspirations remain unfulfilled, Kashmir remains an unresolved international dispute.

But as constitutional expert A.G. Noorani has argued, the provisions of Article 370 have already been reduced to an empty shell. From this perspective, the question is not, therefore, whether this move spells the death of Indian democracy, but rather how it will shape Kashmiri struggles for self-determination moving forward. If Kashmiri territory has been occupied over time through the Indian constitution itself, what might be gained and lost by pursuing the aspiration of self determination through domestic legal means? And how might human rights advocacy and political interventions in the international arena advance the struggle for freedom and justice at this critical historical moment?

A quick explanation of Kashmir's constitutional annexation is necessary to explore the limits of pursuing legal challenges to its revocation within the ambit of the Indian constitution. As noted in one of this week's legal petitions challenging the order, Article 370 has not been tampered with at all. Instead, the Modi administration executed a back door move by issuing a Presidential Order to facilitate amendments to Article 367 that would make Article 370 irrelevant. As the Court established in *State Bank of India v. Santosh Gupta* in 2017, Article 370 has a permanent status with nothing in its clauses allowing its revocations, and any amendments can only be made in concurrence with the J&K constituent assembly. The dissolution of the J&K constituent assembly in 1957 ensured the permanence of Article 370. The recent amendment to Article 367 seeks to transfer the constituent assembly's powers to the state legislative assembly. Since no assembly elections were held in J&K in 2018, this move seeks to empower the centrally-appointed Governor to give consent to the abrogation of Article 370 and 35A in lieu of the state legislature. However, the Governor's consent cannot be equated to taking consent from the state government. In a surreal move, the Government took consent from itself by consulting its own appointee, the Governor. Legal experts consider Modi government's unilateral amendments to Article 367 to be a complete fraud on the constitution.

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The President's order

Despite the strength of the legal challenges, the Supreme Court's overturning of the revocation of Article 370 seems unlikely. Since India's independence, the Court has not acted as an arbiter of truth and justice for Kashmiris, and in recent years Modi's ideological sway over the Court has become amply clear. The Court's previous decisions vis-a-vis Kashmir, ranging from cases of unlawful detention to the death penalty, indicate the Court's consistent position of eroding Kashmiri fundamental rights including the right to life, right to freedom of expression, and right to a fair trial. In declining the urgent listing of one of the petitions challenging the revocation, Justice Ramana offered a telling response: "Is UN going to stay the

President's order or the Constitutional amendment?" Instead of imposing checks and balances on a draconian state, the Supreme Court has used juridical processes to erode and deny Kashmiri political and human rights, emboldening the Indian state to consolidate Kashmiri territory without upholding justice or the rule of law.

Senior advocates such as Rajeev Dhavan, public interest lawyers such as Prashant Bhushan, and leading legal scholars such as Gautam Bhatia have outlined the unconstitutionality of the constitutional changes to Article 370. However, the Chairperson of the Bar Council of India (BCI) expressed enthusiastic support for Modi's unilateral action, issuing a press release to state that "this step could have been taken only by a bold, magnetic, daring, and unparalleled leader like Modiji," and that it clearly illustrates his "wisdom, foresightedness, dynamism, and courage." In response, 81 members of the Madras Bar issued a statement criticizing the BCI Chairperson and expressing concern over the undemocratic revocation of Article 370 and the repressive preventive measures adopted in J&K.

The legal architecture of occupation

In its recent statement that "all eyes are now on the Indian Supreme Court to fulfill its functions in defense of the rights of people of Jammu and Kashmir and the Indian constitution," the International Commission of Jurists is seeking to hold the Indian judiciary accountable for upholding the rights of Kashmiris. But even if the Supreme Court overturns the revocation, J&K's relationship to India would still be delimited by the constitutional logic of autonomy that has maintained the legal architecture of occupation for more than seventy years. Rather than reproducing this occupational constitutionalism, the challenge to the abolition of Article 370 must be advanced in the legal and political arenas of the international community.

The Kashmiri claim of the right to self determination is based on internationally-recognized political, legal, and human rights charters. The international community must intervene to protect the human rights of Kashmiris and ensure a political resolution to the Kashmir dispute in accordance with people's longstanding historical and political right to determine their political futures through a free, fair, and impartial plebiscite. International civil society actors must advocate for diplomatic intervention through international bodies such as the UN General Assembly, UN Human Rights Council, and European Parliament as well as with states that have been concerned with or have engaged with the region in the past.

Advocates for diplomatic intervention worldwide

International bodies have been taking cognizance of the human rights crisis in Kashmir. In 2018 and 2019, the UN Office of the High Commissioner for Human Rights issued human rights reports unequivocally stating that India and Pakistan must respect the Kashmiri right to self determination in addition to ending human rights abuses, revoking impunity laws, and establishing an independent international Commission of Inquiry to investigate egregious abuses of power by the Indian military.

Special rapporteurs have expressed concern over a range of systematic human rights violations including freedom of expression and opinion, extrajudicial killings and torture . And in recent days, UN Secretary General Antonio Guterres issued a statement in response to the presidential order noting that the Kashmir issue is still governed by “international agreements” and urging India and Pakistan to “refrain from taking steps that could affect the status of Jammu and Kashmir.”

UN bodies and other international actors have a vital role to play, and they must act with conscience to protect the fundamental human rights of Kashmiris. The Modi administration’s unilateral action on this bilateral dispute -- one that has historically been recognized as a matter of great concern to the entire global community -- highlights the urgency of international interventions on Kashmir, regardless of the outcome of the legal challenges proceeding in the Supreme Court. A besieged Kashmiri population urgently needs international remedies for justice, not continuing conditions of occupation, militarization and war.

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